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January 6, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal
Date of Filing: August 6, 2004
Case No.: TIA-0156

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' compensation benefits. The Applicant was a DOE contractor employee at a DOE facility. The OWA referred the application to an independent Physician Panel (the Panel), which determined that the worker's illnesses were not related to his work at a DOE facility. The OWA accepted the Panel's determination, and the Applicant filed an Appeal with the DOE's Office of Hearings and Appeals (OHA), challenging the Panel's determination. As explained below, we have concluded that the appeal should be denied.

I. Background

A. The Relevant Statute and Regulations

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. ' ' 7384, 7385. As originally enacted, the Act provided for two programs. Subpart B provided for a Department of Labor (DOL) program providing federal compensation for certain illnesses. See 20 C.F.R. Part 30. Subpart D provided for a DOE assistance program for DOE contractor employees filing for state workers' compensation benefits. Under the DOE program, an independent physician panel assessed whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. ' 7385o(d)(3); 10 C.F.R. Part 852 (the Physician Panel Rule). The OWA was responsible for this program, and its web site provides extensive information concerning the program.¹

The Physician Panel Rule provided for an appeal process. An applicant could appeal a decision by the OWA not to submit an application to a Physician Panel, a negative determination by a Physician Panel that was accepted by the OWA, and a final decision by the OWA not to accept

¹ www.eh.doe.gov/advocacy

a Physician Panel determination in favor of an applicant. The instant appeal was filed pursuant to that Section. The Applicant sought review of a negative determination by a Physician Panel that was accepted by the OWA. 10 C.F.R. ' 852.18(a)(2).

While the Applicant's appeal was pending, Congress repealed Subpart D. Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004). Congress added a new subpart to the Act - Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, all Subpart D claims will be considered as Subpart E claims. In addition, under Subpart E, an applicant is deemed to have an illness related to a work related toxic exposure at DOE if the applicant received a positive determination under Subpart B.

During the transition period - in which DOL sets up the Subpart E program, OHA continues to process appeals of negative OWA determinations.

B. Procedural Background

The Worker was employed at the DOE's Oak Ridge site. He worked at the site, primarily as a security guard, for nearly thirty years, from 1967 to 1996, at times intermittently.

The Applicant filed an application with the OWA, requesting physician panel review of two illnesses - colon cancer and a stroke. The Applicant asserted that his illnesses were the result of exposure to hazardous chemicals in the course of his employment. The Physician Panel rendered a negative determination for both of these illnesses. The Panel found that there was insufficient evidence establishing a link between the Applicant's workplace exposures and his colon cancer. The panel further determined that there was no documented evidence establishing a relationship between occupational exposures and the occurrence of a stroke.

The OWA accepted the Physician Panel's negative determinations and, subsequently, the Applicant filed the instant appeal.

II. Analysis

Under the Physician Panel Rule, independent physicians render an opinion whether a claimed illness is related to exposure to toxic substances during employment at a DOE facility. The Rule requires that the Panel address each claimed illness, make a finding whether that illness was related to a toxic exposure at the DOE site, and state the basis for that finding.²

² 10 C.F.R. § 852.12.

The Applicant argues that the Physician Panel erred in determining that his illnesses were not related to his workplace exposures. The Applicant points to the DOL Subpart B determination that the Worker developed colon cancer after working at a DOE site. The Applicant also provides a list of several areas of the site where radiation was present in which he worked.

With regard to the claimed colon cancer, Subpart E has rendered moot the physician panel determination. A positive DOL Subpart B determination meets the Subpart E requirement that the illness be related to toxic exposure during employment at DOE. The Applicant received a positive DOL Subpart B determination for colon cancer. Accordingly, further consideration of alleged errors in the Panel report with regard to the claimed colon cancer is not necessary.

With regard to the claimed stroke, the Applicant's arguments do not provide a basis for finding panel error. The Panel addressed the illness, made a determination on the illness, and explained the basis of that determination. The Panel determined that there was no evidence of a relationship between the illness and exposure to toxic substances while in the course of the Applicant's employment. The Panel noted that the stroke occurred three years after the termination of the Applicant's employment. The Panel also noted the presence of strong non-occupational risk factors such as smoking and a family history of high blood pressure and stroke. The Applicant's argument is a mere disagreement with the Panel's medical judgment rather than an indication of panel error. Accordingly, the Applicant's appeal regarding the claimed stroke does not provide a basis for finding panel error.

As the foregoing indicates, the Applicant's claim does not provide a basis for finding panel error and, therefore, should be denied. In compliance with Subpart E, the claim will be transferred to the DOL for review. The DOL is in the process of developing procedures for evaluating and issuing decisions on these claims. OHA's denial of this claim does not purport to dispose of or in any way prejudice the Department of Labor's review of the claim under Subpart E.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0156 be, and hereby is, denied.
- (2) This denial pertains only to the DOE claim and not to the DOL's review of this claim under Subpart E.

(3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: January 6, 2005

